No. 22633

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

INTALCO ALUMINUM CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF OF INTALCO ALUMINUM CORPORATION.

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BRIEF OF INTALCO ALUMINUM CORPORATION.

Jurisdiction.

Jurisdiction is founded on the existence of a question arising under the provisions of the National Labor Relations Act, 29 U.S.C. §151 *et seq.,* and specifically §29 U.S.C. §158(a)(2) and 160(f) (hereinafter referred to as the Act). Jurisdiction was alleged in paragraphs 4 and 5 of the complaint [IR 10].*

Statement of Case.

Intalco Aluminum Corporation (hereinafter referred to as Appellant) operates a basic aluminum production facility near Ferndale, Washington.

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*Frequent reference will be made herein to the transcript of the record. The reference IR 10 refers to page 10 of volume one of that record. Reference will be made to exhibits as, for example, GC 2 and INT 3 which refers to General Counsel's Exhibit 2 and Intervenors Exhibit 3, respectively.

On March 10, 1966 the International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter referred to as the Machinists or Intervenor) advised petitioner that the Machinists represented a majority of petitioner's employees and demanded that petitioner recognize the Machinists. In support of its claim of majority status the Machinists offered to submit to a card check [GC 2]. The Machinists' demand was by letter and petitioner by letter agreed to meet and investigate the Machinists' claim and damand [GC 3].

On March 16, 1966, petitioner met with the Machinists and with two representatives of the Division of Industrial Relations of the Department of Labor and Industry of the State of Washington (hereinafter referred to as the State Labor Department). Agreement was reached upon the description of the production and maintenance unit and petitioner consented to a check of authorization cards of the Machinists by the State Labor Department [GC 4, 5, 6, 7]. Petitioner advised the State Labor Department that other labor organizations had expressed an interest in petitioner's employees [IIR 1097, 1098].

The State Labor Department conducted the check of authorization cards and certified that the Machinists had presented 81 valid authorization cards out of a total complement of employees in the agreed upon unit of 122 [GC 6, 7]. The authorization cards used in the check were clear and unambiguous authorizations on the part of the employees for the Machinists to represent them [INT 1]. The unambiguous nature of the authorization was underscored by the fact that on the top of the card in bold letters was the phrase "Yes I want the IAM" [INT 1].

Petitioner recognized the Machinists on March 17, 1967 by appropriate notices posted in the plant. Negotiations commenced shortly thereafter and an agreement was signed on April 14, 1966 [GC 11].

In July and November 1965 a representative of the United Steelworkers of America, AFL-CIO (hereinafter referred to as Steelworkers) advised petitioner that the Steelworkers intended to organize petitioner's employees [IIR 20-1, 2, 3]. The Steelworkers' organizing campaign did not become active until sometime in March when a trailer was located off the plant premises [IIR 27, 26]. The Steelworkers obtained few, in any, authorization cards prior to the 1st of March [INT 10, 25, 38, 5].

A representative of the Aluminum Workers International Union, AFL-CIO (hereinafter referred to as Aluminum Workers) also contacted Company representatives in December 1965 and announced that he was going to organize petitioner's employees [IIR 20]. The Aluminum Workers campaign was not active, however, until sometime after the first of the year 1966, the first card being obtained on January 24, 1966 [GC 9]. No outward manifestation of the Aluminum Workers campaign was made so that the public or petitioner would be aware of the campaign until the institution of legal proceedings as noted hereinafter.

The Bellingham Metal Trades Council, Allied Industries Division (hereinafter referred to as Metal Trades Council) engaged in minor organizational activities after March 1, 1966 and obtained only a limited number of authorization cards [INT 3A, 4, 13, 15, 17, 26, 30 and 37]. Most of the cards obtained by the Metal

Trades Council were dated after recognition was extended to the Machinists [INT 3A, 4, 13, 15, 17, 26, 30 and 37].

On March 18, 1966, the day after the recognition was extended to the Machinists, the Steelworkers, Aluminum Workers and Metal Trades Council filed unfair labor practice charges in Case Nos. 19-CA-3346, 3347 and 3348, respectively. The Aluminum Workers filed a petition for representation in Case No. 19-RC-3896. Hearing on the consolidated complaint followed.

The essential allegations of the consolidated complaint were that petitioner had given unlawful assistance to the Machinists in violation of Section 8(a)-(2) of the Act by recognizing the Machinists and by furnishing a list of names of employees to the Machinists.

The Trial Examiner specifically found that no unlawful assistance was given Intervenor [IR 51].

The Trial Examiner specifically found, and all of the findings of the Trial Examiner were affirmed by the Board, that there was "an absence of bad faith on the part of Respondent [Appellant]" [IR 50].

The Board found specifically that the agreement entered into by Appellant and the Machinists to consent to a cross check was recognition by the parties that a "question concerning representation" existed [IR 88]. The Board further found that other unions "then known by Respondent [Petitioner] and the Intervenor to be engaged in organizing the employees involved" were not given opportunity to participate in the cross check [IR 88]. This appeal followed.

Specification of Errors.

Petitioner contends that:

1. The Board acted contrary to law by holding that recognition of the Machinists by Petitioner was unlawful.

2. The Board acted contrary to law by extending the rule in *Midwest Piping Co.*, 63 NLRB 1060 (1945) to the facts of this case.

3. The Board contravened national labor policy by holding that Petitioner recognizes a union at its peril when it has no good faith doubt concerning the union's majority status.

4. The Board's finding that the Machinists did not represent a majority of Petitioner's employees is not supported by substantial evidence in the record considered as a whole.

5. The Board misconstrued the decision of the Supreme Court of the United States in the case of *International Ladies Garment Workers Union, AFL-CIO v. NLRB,* 366 U.S. 731 (1961).

6. The Board improperly ordered Petitioner to reimburse employees for dues paid by employees to the Machinists.

7. The Board improperly overruled the Trial Examiner's interim ruling that circumstances surrounding the signing of unambiguous authorization cards could not be introduced into evidence [IR 44].

Summary of Argument.

Petitioner extended recognition to the Machinists after a cross check of authorization cards was conducted by representatives of a state agency. Petitioner

had no good faith doubt about the majority status of the Machinists at the time of recognition. Under these circumstances the rule in the case of *Snow v. NLRB*, 308 F. 2d 687 (9th Cir. 1962) is applicable. Petitioner was required by law to recognize the Machinists.

The Board justified its holding by finding that in this case Petitioner should have insisted that other unions who had engaged in organizing activities but did not claim majority status be permitted to participate in the cross check.

Such a requirement would require more of an employer than the Board requires or permits under its rules. It is also an unwarranted extension, particularly in this circuit, of the rule in *Midwest Piping, supra.*

The Board ruling which places an employer in jeopardy (acting at his peril) when he follows established rules violates the national labor policy (which encourages collective bargaining), concepts of fair play and the due process clause of the fifth amendment to the Constitution of the United States.

The rule in the *Snow* case provides an objective standard for ascertaining majority status and the Board is precluded from finding otherwise when the conditions in the case are satisfied. Furthermore, uncommunicated revocation of authorization, authority or subjective reservations not made public cannot vary the unambiguous statement on a signed authorization card. Board determination of majority status based on considerations of uncommunicated revocation or reservation is improper.

Dues reimbursement by an employer who neither got the money nor acted improperly is not proper.

ARGUMENT.

I.

Recognition of the Machinists Union Is Required by Law and the Holding of the Board to the Contrary Is Erroneous.

The rule in this circuit is that upon demand an employer *must* recognize a union if the employer entertains no good faith doubt concerning the union's majority status. This rule was established by the court in the case of *Snow v. NLRB,* 308 F. 2d 687 (9th Cir. 1962) at pages 691, 692, 693 and 694. The rule is unequivocal and may not be avoided by a subsequent showing that at the time of recognition grounds existed which would have created a doubt had they been known. *Id.* at page 694.

In the instant case majority status was established by an impartial third party, the State Labor Department [IR 88], through a check of unambiguous authorization cards [INT 1]. The Board affirmed the Trial Examiner's holding that there "was an absence of bad faith on the part of Respondent" in recognizing the Machinists [IR 50].

The *Snow* case is dispositive of the case here. Here all elements of the *Snow* case are present: (1) majority established by unambiguous authorization cards; (2) verified by an impartial third party; and (3) a good faith employer who did not and had no reason to doubt the union's majority status. The rule in the *Snow* case requires recognition. The *Snow* case has been reaffirmed in *Retail Clerks Union, Local 1179 v. NLRB,* 376 F. 2d 186 (9th Cir. 1967); See also *NLRB v. Kellogg's, Inc.,* 347 F. 2d 219 (9th Cir.

1965); *Dixon Ford Shoe Co.,* 150 NLRB 861 (1965); *Levi Strauss & Co.,* 172 NLRB No. 57 (1968); and *McEwen Manufacturing Company and Washington Industries, Inc.,* 172 NLRB No. 99 (1968).

II.

The Company Was Precluded by Law From Insisting on Delaying Recognition Because Other Unions Had Shown an Intention to Organize: Midwest Piping Is Not Applicable.

The principal holding of the Board in the decision appealed here was that a "question concerning representation" existed at the time petitioner recognized the union and that this "question of representation" was not resolved because the recognition by petitioner was not "attended by appropriate safeguards" [IR 88]. The lack of safeguards cited by the Board in support of its decision arose because other unions who were then "engaged in organizing" were not afforded an opportunity to participate in the investigation of the "question concerning representation." [IR 88]. This holding of the Board is tantamount to a holding that the *Midwest Piping* doctrine is applicable. The *Midwest Piping* doctrine is a rule of the Board first enunciated in the case of *Midwest Piping Co.,* 63 NLRB 1060 (1945). Essentially the rule provides that an employer may not elect between two or more unions who claim majority status and demand recognition.

In this circuit the question as to applicability of the *Midwest Piping* doctrine on the facts presented here is controlled by the case of *Retail Clerks Union, Local 770 v. NLRB,* 370 F. 2d 205 (9th Cir. 1966). In the *Retail Clerks* case the court held that recognition by an

employer of a second union which demonstrated its majority status by a card check at a time when a different union showed an interest and had in fact obtained authorization cards was not an unfair labor practice and that the *Midwest Piping* doctrine was not applicable under such circumstances.

The *Midwest Piping* doctrine is applicable only to situations where more than one union claims majority status and demands recognition. The decision here on appeal was not based on a finding that any union other than the recognized union had claimed majority status or demanded recognition [IR 88-89, 48-49]. The Board found specifically to the contrary [IR 48-49]. The uncontradicted evidence in the record is that no union other than the Machinists made a demand for recognition and that the last time that any union other than the recognized union had communicated with the employer was some three months before the date of recognition when an Aluminum Worker representative expressed an intent to organize petitioner's employees [IIR 20]. The Steelworkers and Bellingham Metal Trades Council organizing activities were minimal [GC 9, INT 3A, 4, 13, 15, 17, 26, 30 and 37]. None of the activity other than that of the Machinists constituted a demand for recognition. The fact that no demand for recognition was made by other unions is of itself an indication of lack of real interest. Unions may demand recognition when they do not have majority status, but rarely, if ever, have majority status without making a demand.

Petitioner notified the officials of the State of Washington at the time of the card check that the other unions had been attempting to organize Appellant's em-

ployees [IIR 1097-1098]. Had petitioner with no doubt concerning majority status insisted upon a delay of the proceedings so that the other unions could have participated in the card check petitioner would have violated this court's rule enunciated in the case of *Retail Clerk's Union, Local 1179 v. NLRB,* 376 F. 2d 186 (9th Cir. 1967). In the *Retail Clerk's* case the employer had no doubt as to the union's majority status at the time of the card check but delayed recognition in order to consult with his attorney. The card check took place on September 25 and on October 1 after talking to his attorney and after discovering that two of the card signers no longer desired to have the union represent them, the employer refused to recognize the union. This court held that the delay was a refusal to bargain on the basis of the court's decision in the *Snow* case. The *Retail Clerks* case is directly applicable here.

The alleged requirement of the Board on which it based its decision here to the effect that the employer should have taken affirmative action to see that the other unions participated in the card check is completely without foundation in Board precedent and violates the Board's established rules concerning resolution of a "question concerning representation". The only requirement of the Board with respect to other unions is a requirement on the Board's representation petition form (Form NLRB-502) [GC 8] requiring in paragraph 12 a designation of other unions interested.

On the other hand, the employer in a representation proceeding is precluded from participating in any way (either by review or otherwise) in the Board's determination of the extent to which any union is allowed to participate. Whether or not a union may in-

tervene or participate in representation proceedings is based upon what the Board calls a "showing of interest". The Board rules are specific. The National Labor Relations Board Field Manual at Section 11020 provides as follows:

> "11020 *In general:* The requirement as to adequacy of interest on the part of labor organizations *initiating or seeking participation* in an R case helps to avoid unnecessary expenditure of time and funds where there is no reasonable assurance that a genuine representation question exists, and prevents persons with little or no stake in a bargaining unit from abusing the Agency's machinery and interfering with the normal administration of the Act.
>
> "*The determination of the extent of interest is a purely administrative matter, wholly within the discretion of the Board. While any information offered by any party bearing on the validity of the evidence offered in support of an asserted interest should be received, weighed, and, if appropriate, acted upon, there is no right in any such party to litigate the subject, either directly or collaterally.* (See 11028.4.)" (Emphasis supplied).

This rule of the Board incorporated in its field manual is reflected in the case of *U.S. Chaircraft, Inc.*, 132 NLRB 922 (1961) wherein the Board stated that it "is for the Regional Director or the Board and *not the parties* to determine whether a claim has sufficient authority or validity to require that notice of the proceeding be given to the claimant and an opportunity be given to be placed on the ballot in any consent election which may be held". (Emphasis supplied). To the same effect

is the decision in *O. D. Jennings & Company,* 68 NLRB 516 (1946).

The facts here show that the appellant satisfied all of the Board requirements had the "question concerning representation" been resolved by the Board. The employer notified the impartial third party which conducted the check that other unions had been organizing. This is the only Board requirement, and indeed, as the Board Field Manual and the cases show is as far as the employer is *permitted* to participate under Board rules. The Board cannot require higher standards of a state agency than it requires under its own rules.

The last published annual report of the National Labor Relations Board (31st Annual Report of the National Labor Relations Board for the Fiscal Year Ending June 30, 1966) contains the following statement at page 46:

> "The Act requires that an employer bargain with the representative designated by a majority of his employees in a unit appropriate for collective bargaining. But it does not require that the representative be designated by any particular procedure as long as the representative is clearly the choice of a majority of the employees. As one method for employees to select a majority representative, the Act authorizes the Board to conduct representation elections."

A similar statement has been included in the Board's Annual Report for years. See in this connection the Thirtieth Annual Report at page 45, the Twenty-Ninth

Annual Report at page 43, Twenty-Eighth Annual Report at page 46, Twenty-Seventh Annual Report at page 43 and the Twenty-Sixth Annual Report at page 32.

Checks of authorization cards by state agencies have repeatedly been held to be a valid method of ascertaining majority status. In *Western Meat Packers, Inc.*, 148 NLRB 444, 57 LRRM 1028 (1964) the Board affirmed the following findings of the Trial Examiner appearing at pp. 449-450:

> "It is well established that a Board election is not the sole means by which a union may validly secure recognition as bargaining representative. See United Mine Workers of America v. Arkansas Oak Flooring Co., 351 U.S. 62.
>
> * * * *
>
> ". . . The Board has also recognized as fact State election results and precluded itself from holding second elections."

Contrary to the claimed basis, here, the Board regularly recognizes state proceedings providing fewer safeguards than do Board procedures. As an example of this are the cases of *West Indian Co., Ltd.*, 129 NLRB 1203, 47 LRRM 1146, 1147 (1961) and *Screen Paint Corp.*, 151 NLRB 1266, 1270, 58 LRRM 1641 (1965).

The phrase "question concerning representation" used by the Board is a phrase frequently incorporated in Board decisions. It is incapable of precise definition. If the Board finds that a "question concerning

representation" exists, it must proceed to an election, because the Board has only one method of resolving issues involving representation desires of employees and that method is an election. The effect of the use of the phrase "question concerning representation" is that if the Board determines that an election should be directed it finds a "question concerning representation." If it does not desire that an election be conducted, it finds the lack of existence of a "question concerning representation". The phrase becomes a characterization of appropriate procedure.

If Board procedure is meaningful, the existence or nonexistence of a "question concerning representation" must be determined by objective standards. This is precisely what this court held in the *Snow* case. The thrust of the holding in the *Snow* case is that an employer faced with an objective showing of majority status must recognize the union even though facts exist which would indicate the lack of the existence of majority status. The employer who is unaware of such facts cannot rely on them. The employer cannot delay nor can he engage in lengthy investigation to ascertain hidden facts. He is bound by an objective standard. The objective standard was satisfied here. The employer ought not be held to answer by way of unfair labor practice charges.

III.

Under the Circumstances Here The Board Ruling That the Employer Recognize a Union at Its Peril Is Contrary to Law, Violates Fundamental Concepts of Fair Play and the United States Constitution and Is Not Consistent With the National Labor Policy.

Authority for determining the appropriate bargaining representative is vested in the Board by virtue of Section 9 of the Act. Elaborate machinery is provided therein for determining union majority status. It may be presumed that Congress in enacting the various provisions of Section 9 of the Act desired that "questions concerning representation" be determined by an orderly, definitive and certain process. The National labor policy based on such a process could not be considered to require an employer to act at his peril in recognizing a union. As noted earlier herein, the Board has time and again reiterated the statement that majority status may be determined in a number of ways. Among the ways recognized by the Board is a determination by a check of authorization cards under the auspices of state labor relations agencies. Where as here the employer is required to recognize a union, a rule that the recognition is performed under pain of being thereafter found guilty of an unfair labor practice charge violates the national labor policy and is clearly erroneous.

The Board's rule concerning recognition after a showing of valid authorization cards commands recog-

nition. On the other hand, the ruling in this case, that such a recognition subjects the employer to unfair labor practice charges is completely inconsistent.

Due process is a function of fundamental fairness. Inconsistent legal commands such as that presented here is a denial of the rule of fundamental fairness as outlined in *International Shoe Co. v. Washington,* 326 U.S. 310, 320 (1945) and is a violation of the fifth amendment to the Constitution. It is comparable to the situation presented in *Western Union Telegraph Co. v. Penn,* 368 U.S. 71 (1961) where the Supreme Court struck down the Pennsylvania court ruling placing a stockholder in a potential double liability situation.

IV.

The Board Findings That the Machinists Were Not the Majority Representative of Petitioners Employees Is Not Supported by Substantial Evidence in the Record Considered as a Whole and Is Contrary to Fact and the Board Rules and Is Clearly Erroneous as a Matter of Law.

Out of a total of 122 employees the union presented 81 validly executed authorization cards [IR 47]. The authorization cards were painfully unambiguous [INT 1]. Apparently the cards had been prepared specifically to avoid any possible ambiguity and contained across the top in bold letters "Yes, I want the IAM". Unambiguous authorization cards must be accepted at their face value by employers. To quote the Board ". . . a long line of judicial authority holding that in the absence of clear proof of fraud or coercion, full effect must be given a clear authorization card regardless of the subjective state of mind of the signer." This statement of the Board appears in the recent case of *Levi*

Strauss & Co., 172 NLRB No. 57 (1968). In support of this statement the Board cited the following cases:

NLRB v. Fosdol, 367 F. 2d 784, 786-787 (7th Cir. 1966);

NLRB v. Gorbea, Perez & Morrell, 300 F. 2d 886-887 (1st Cir. 1962);

Joy Silk Mills v. NLRB, 185 F. 2d 732 (D.C. Cir. 1950).

In the *Levi Strauss* case the Board set out its policy with respect to unambiguous authorization cards.

> "The central inquiry in determining the effect to be given authorization cards is whether the employees by their act of signing clearly manifested an intent to designate the union as their bargaining agent. The starting point, in assessing that intent, is the wording of the card. Where a card on its face clearly declares a purpose to designate the union, the card itself effectively advises the employee of that purpose, and particularly so where, as here, the form of the card is such as to leave no room for possible ambiguity. An employee who signs such a card may perhaps not understand all the legal ramifications that may follow his signing, but if he can read he is at least aware that by his act of signing he is effectuating the authorization the card declares. To assume that the employee does not intend at least that much would be to downgrade his intelligence or charge him with irresponsibility. We are unwilling to do either. Without ascribing to such cards and their signing all the solemnity and binding effect associated with deeds, or wills, or contracts, or bills and notes, there is, we believe, in the case of clearly

expressed authorization cards, as in the case of other signed instruments, no valid basis in reason or law for denying face value to the signed cards, absent affirmative proof that the signing was a product of misrepresentation or coercion.

* * * * *

"Thus the fact that employees are told in the course of solicitation that an election is contemplated, or that a purpose of the card is to make an election possible, provides in our view *insufficient* basis in itself for vitiating unambiguously worded authorization cards on the theory of misrepresentation. A different situation is presented, of course, where union organizers solicit cards on the explicit or indirectly expressed representation that they will use such cards *only* for an election and subsequently seek to use them for a different purpose; i.e., to establish the Union's majority independently."

See also the companion case of *McEwen Manufacturing Company and Washington Industries, Inc.*, 172 NLRB No. 99 (1968).

No attempt was made by the Trial Examiner to resolve any questions concerning the validity of the unambiguous authorization cards presented here. The Trial Examiner and the Board found it unnecessary to determine the validity of the cards on the basis of an allegedly unresolved "question concerning representation" which is demonstratively improper as set out earlier herein.

Competent evidence in line with the *Levi Strauss* case was presented to the Board to demonstrate that the signers of the cards understood the card and what it

meant [IIR 233, 235, 284, 361, 400, 501-502, 536, 572, 580, 667, 716, 790, 864, 914, 972, 989-990, 1071]. Effective argument and proof was also given the Board to the effect that the understanding of all of the employees was consistent with the nature of the cards as demonstrated by the statements contained on the cards.

The Board holdings in the *Levi Strauss* case and the *McEwen Manufacturing Company* case to the effect that the subjective intent of employees signing cards is not a proper area of inquiry was flagrantly violated in the instant case. During the process of the proceedings petitioner and Intervenor objected to the introduction of evidence which would go to the subjective intent of the signer [IIR 53 *et seq.*]. The objection of petitioner was on the basis of the rule enunciated by this court in the *Snow* case to the effect that the subjective intent (being unknown to the employer) is not a proper area of inquiry under the ruling in that case and thus not a proper basis for gauging the activities or the actions of the employer. The Trial Examiner who by coincidence was the same Trial Examiner who first heard the *Snow* case sustained the objections of the employer and Intervenor and precluded evidence of subjective intent. This ruling of the Trial Examiner was overruled by the Board [IR 44] and further proceedings were held during which such evidence was admitted.

The Board ruling in this area had an impact on the Trial Examiner and obviously influenced his subsequent decision. The Board ruling was clearly erroneous.

Where, as here, the authorization cards are clear and unambiguous on their face they must be accepted at their face value if any effect is to be given to this Court's rules.

Likewise, the ruling of the Board that certain of the cards presented during the card check were cancelled by the signing by the same employees of cards containing a revocation of prior cards is no basis for disputing the effect of the card check. The record is void of any evidence showing that the signing of subsequent cards was at any time communicated to the employer. As repeatedly pointed out herein the existence of a disability, if disability there be, unknown to the employer at the time of the check of cards does not relieve the employer from recognizing the union.

The majority status of any union is a fluctuating status. The election results for a group of employees would in all probability be different if another election were held immediately after the tally of ballots on the first election. The results one week would be different than the results the following week. The desires of employees for union representation fluctuate from time to time and from day to day. National labor policy decrees that some permanence be given to the appropriate selection of bargaining representatives. In the case of a Board election the Board has adopted a rule that such permanence must last for at least one year from the date of certification. Undoubtedly during the course of the year the employees' desires fluctuate. The one year rule and other pronouncements of the Board are but another way of saying that once the sentiments of employees have been established by objective standards that result will not be disturbed by

after thoughts. This is the thrust of the decision of this court in the *Snow* case.

The theory and reasoning behind such a rule was demonstrated years ago in the case of *National Labor Relations Board v. Century Oxford Corp.,* 140 F. 2d 541, 542 (2d Cir. 1944). There the Board conducted an election and certified the results in favor of the union. Thereafter, the employees circulated a petition which indicated that the employees no longer desired the union as their bargaining representative. The court in commenting upon and sustaining the Board in its finding that the union continued to be the bargaining representative had the following to say concerning the fugitive nature of majority status and of the need for some degree of permanence in the designation of bargaining representative:

> "The purpose of the act is to insure collective representation for employees, and to that end § 9 gives power to the Board to supervise elections and certify the winners as the authorized representatives. Inherent in any successful administration of such a system is some measure of permanence in the results; freedom to choose a representative does not imply freedom to turn him out of office with the next breath. As in the case of choosing a political representative, the justification for the franchise is some degree of sobriety and responsibility in its exercise. Unless the Board has power to hold the employees to their choice for a season, it must keep ordering new elections at the whim of any volatile caprice; for an election, conducted under proper safeguards, provides the most reliable means of ascertaining the deliberate will of the employees. How long

Reliance on the *Garment Workers* case presumes recognition of a minority union. The minority status of the Machinists never was established. To assume minority status either is improper or begs the question. As pointed out earlier herein the minority or majority status of a union must be established by objective standards. The accepted standards were followed by the employer here and no better authority for that proposition exists than the *Garment Workers* case cited by the Board. The *Garment Workers* case stands only for the proposition that an employer acts at his peril if he elects to follow an unapproved method of accertaining majority status. The Supreme Court in that case clearly indicated that the procedure followed here was a satisfactory method of determining majority status. The Supreme Court specifically held in that case at pages 739-740 as follows:

> "If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or authorization cards."

Thus, the *Garment Workers* case specifically holds that a check of authorization cards is a valid objective determination of majority status with the result that once this has been done there can be no claim that a minority union was recognized.

The *Garment Workers* case is clear authority in support of the exact opposite from that for which the Board cites it.

VI.

The Dues Reimbursement Remedy Is Improper.

In the *Garment Workers* case, *supra,* the Supreme Court did not order dues reimbursement. Instead it had the following to say concerning the remedy at page 740:

> "If he is found to have erred in withholding recognition, he is subject only to a remedial order requiring him to comform his conduct to the norms set out in the Act, as was the case here. No further penalty results. We believe the Board's remedial order is the proper one in such cases."

In *Hughes & Hatcher, Inc. v. NLRB,* 57 LC. ¶12,614 (6th Cir. 1968) at page 21, 357 the dues reimbursement remedy was raised, as here, and disposed of as follows:

> "One other matter remains, and that is the Board's order requiring H & H to make restitution to its employees of the initiation fees and dues paid by its employees under the checkoff provisions of the bargaining agreement, and the proviso in the order which attempted to preserve the rights of employees against the employer under the illegal agreements.
>
> "Retail Clerks asserts in its brief that these moneys are held in escrow by H & H to await the decision of this court. Amalgamated states in its brief that the moneys were paid to it. The record does not disclose the facts.
>
> "If H & H is holding the moneys in escrow to await the decision of this court, there will be no problem, as it can make distribution in accordance with the Board's order. If H & H has paid the moneys to Amalgamated, then the Board's order should be directed against that union and not against

> H & H, which acted merely as a conduit for the funds, and there is no reason why it should be penalized. Amalgamated violated the Act just as well as H & H, and if it received the money it should refund the same."

The dues reimbursement remedy should be similarly treated here. Moreover, by all rules of the Court the employer here was precluded from legally ascertaining any disability in the authorization cards. Any disability, if disabilities there were, was employee generated and Machinists perpetuated. They should handle the dues problem *inter sese*. To hold the employer is improper.

Conclusion.

Under the rules in the Ninth Circuit, on the basis of the facts presented here the employer was required to recognize the Machinists. The Board may not overrule the Court's decision in the *Snow* case by characterization and find mysteriously a lack of resolution of a "question concerning representation" on the pretext of improper employer action where Board rules preclude such employer action. There is no recognition at the "peril" of the employer when he follows established rules. The employer here followed the rules of the Ninth Circuit and the Supreme Court of the United States when it extended recognition to the Machinists.

In any event, the dues reimbursement remedy was improper.

It is respectfully submitted that the order of the Board should be set aside.

Kindel & Anderson,
Roy E. Potts,
By Roy E. Potts,
Attorneys for Petitioner.

APPENDIX.

Exhibits Introduced at Hearing	Description	Page in record* Where Exhibit Was Identified	Offered	Received
General Counsel (GC) Exhibit la-lv	Board formal documents	6	6	6
GC 2	Letter demand for recognition	37	39	40
GC 3	Letter reply of Company to demand	38	39	40
GC 4	Consent to cross check	38	39	40
GC 5	List of employees	38	39	40
GC 6	State certification	39	39	40
GC 7	Letter State of Washington re cross check	40	40	40
GC 8	Representation petition in Case No. 19-RC-3896	49	50	51
GC 9	Aluminum Workers Authorization Cards	89	89	95
GC 10	Company payroll records	118	177	177
GC 11	Collective bargaining agreement	177	177	177
GC 12	List of classifications	181	182	188
GC 13	Boardwise on special motion	200	201	201
GC 14	Supplemental to GC 10	826	826	826
GC 15	Motion of General Counsel	855	854	855
GC 16	Ballard affidavit	1164	1165	1165
GC 17	Employee classifications	1208	post	post

*All page references are to Volume II of record.

Exhibits Introduced at Hearing	Description	Page in record Where Exhibit Was Identified	Offered	Receive
Intervernors Exhibit 1 (Int.)	IAM authorization Cards	46	46	46
Int. 2	Nims affidavit	275	275	275
Int. 3A	Metal Trades Council Authorization Cards	301	311	311
Int. 3B	Certificate of Horgen	301	311	311
Int. 4	Quillen Metal Trades Council Authorization Card	347	347	347
Int. 5	Hawn authorization card	368	378	379
Int. 6	Hawn authorization card-Metal Trades Council	368	378	379
Int. 7	Hawn affidavit	368	378	379
Int. 8	Bayer affidavit	424	425	426
Int. 9	Bayer affidavit of July 27, 1966	426	427	440
Int. 10	Bailey authorization card-Steelworkers	456	474	474
Int. 11	Bailey affidavit	456	474	474
Int. 12	Feldman statement	479	481	481-2
Int. 13	Morris authorization card-Metal Trades Council	507	526	526
Int. 14	IAM statement	529	529	530
Int. 15	Oppenwall authorization card, Metal Trades Council	546	553	553
Int. 16	Oppenwall statement	546	553	553

Exhibits Introduced at Hearing	Description	Page in record Where Exhibit Was Identified	Offered	Received
Int. 17	Ackerman authorization card, Metal Trades Council	567	570	570
Int. 18	Ackerman statement	567	570	570
Int. 19	Blank Steelworkers affidavit (sample)	613	626	626
Int. 20	Steelworkers letter to Company	613	626	626
Int. 21	Envelope	613	626	626
Int. 22	Anderson affidavit	620	622	650
Int. 23	Irwin affidavit	668	683	692
Int. 24	Irwin and Hindman affidavit	679	683	692
Int. 25	McClusky authorization card Steelworkers	753	755	755
Int. 26	McClusky authorization card Metal Trades	753	755	755
Int. 27	McClusky affidavit	775	775	779
Int. 28	Back of cards	818	819	819
Int. 29	Lamm affidavit	871	872	877
Int. 30	Lamm authorization card Metal Trades Council	878	882	883
Int. 31	Lamm statement	878	882	883
Int. 32	Lamm statement	878	882	883
Int. 33	Bellinger authorization card Aluminum Workers	921	921	922
Int. 34	Bellinger statement	925	925	930
Int. 35	O'Brine statement	957	960	960
Int. 36	Keith statement	980	986	987

Exhibits Introduced at Hearing	Description	Page in record Where Exhibit Was Identified	Offered	Received
Int. 37	Anderson authorization card Metal Trades Council	1024	1024	1025
Int. 38	Hindman authorization card Steelworkers	1076	1076	1077
Int. 39	Hindman authorization card-Metal Trades Council	1077	1078	1078
Int. 40	Hindman affidavit	1078	1082	1082
Int. 41	Boeing contract	1092	1092	1092
Int. 42	Aero Mechanics Newspaper	1092	1092	1092
Int. 43	Aero Mechanics Newspaper	1092	1092	1092
Int. 44	Machinists form letter	1121	1122	1123